

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE WASHINGTON STATE GAMBLING COMMISSION

Received
JUN 08 2015
Gambling Commission
Comm. & Legal Division

In The Matter Of:

ROBERT L. SMITH,
Longview, Washington

License No. 68-12889.

OAH Docket No. 03-2015-GMB-00001

Agency No. CR 2014-02092

INITIAL ORDER

1. ISSUES

- 1.1. Has Robert L. Smith ("Mr. Smith") violated RCW 9.46.075(1), (4), and (8), RCW 9.46.153(1), and WAC 230-03-085(1), (2) and (3) to warrant the revocation of Mr. Smith's card room employee license?
- 1.2. Has Robert L. Smith proved by clear and convincing evidence that he has the necessary qualifications for licensure required under this chapter, as well as the qualifications of the facility in which his licensed activity will be conducted?

2. ORDER SUMMARY

- 2.1. Mr. Smith was convicted in 2012 and again in 2014 of assault in the fourth degree. The convictions were based on Mr. Smith's violation of Longview Municipal Code §9.12.010(1). Those convictions show that Mr. Smith has failed to comply with RCW 9.46.075(1), (4), and (8), RCW 9.46.153(1), and WAC 230-03-085(1), (2) and (3). The Washington State Gambling Commission ("Commission") has the duty to keep the criminal element out of gambling and to promote social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control. Therefore, this Initial Order revokes Mr. Smith's card room employee license.

3. HEARING

- 3.1. Hearing Date: Wednesday, April 29, 2015.
- 3.2. Administrative Law Judge: John M. Gray, ALJ.
- 3.3. Appellant: Robert L. Smith.

3.3.1. Representative: Robert L. Smith, representing himself.

3.3.2. Witnesses:

3.3.2.1. Robert L. Smith.

3.4. Agency: Washington State Gambling Commission.

3.4.1. Representative: Gregory J. Rosen, Assistant Attorney General

3.4.2. Witnesses:

3.4.2.1. Julie Sullivan, Special Agent, Gambling Commission.

3.5. Exhibits: The Commission's Exhibits 1 through 19 were admitted, without objection. Mr. Smith's exhibits A through C were admitted.

3.6. Other: All witnesses were sworn before they testified.

4. FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

Jurisdiction

4.1. The Director of the Commission signed a Notice of Administrative Charges and Opportunity for Adjudicative Proceeding to Mr. Smith on December 23, 2014. The Commission served the NOA by placing two copies in the United States mail to Mr. Smith on December 24, 2014, one by regular mail and the other by certified mail.

4.2. Mr. Smith filed a Request for Administrative Hearing and Interpreter with the Commission, which the Commission received on January 12, 2015.

4.3. The Department issued a card room employee license to Mr. Smith most recently on November 1, 2014. Without more, the license will expire on November 1, 2015, at midnight. The license number is 68-12889.

4.4. Mr. Smith is an individual who resides in Longview, Washington. He works at Island Casino in Longview.

- 4.5. The incident that led to the proposed license revocation by the Commission occurred on May 12, 2014, in Longview, Washington.¹
- 4.6. Mr. Smith had been drinking on that day. He got into an argument with Charlotte Denny, with whom he lived. They argued and he became violent. A door knob broke and Mr. Smith threw the door knob at Ms. Denny, hitting her in the head. See, e.g., Exhibit 7, page 6 and 11-12; Exhibit 8; and Exhibit 10, page 2, no. 7.
- 4.7. Both Mr. Smith and Ms. Denny fought. The Longview Police Department decided to charge Mr. Smith as the "primary aggressor" "due to the size difference between Robert and Charlotte, the injuries to both parties, and the statements made[.]" Exhibit 7, pp. 6 and 12.
- 4.8. The Longview Police Department charged Mr. Smith with a violation of Longview Municipal Code ("LMC") 9.12.010(1), assault in the fourth degree. Exhibits 7, page 5 and Exhibit 19.
- 4.9. Mr. Smith pleaded guilty to the charge of assault in the fourth degree on July 28, 2014. In paragraph 7 of the Statement of Defendant Upon Plea of Guilty, Mr. Smith wrote, "I threw a door knob at my girlfriend after drinking, hitting her in the head." Exhibit 10, page 2, no. 7.
- 4.10. The Court sentenced Mr. Smith to serve 10 days on a work crew, to pay a fine and court costs, to be on probation until training was completed, and to successfully complete anger management training. Exhibit 11, page 1.
- 4.11. This was not Mr. Smith's first conviction of assault in the fourth degree. He also committed an act constituting a violation of LMC 9.12.010(1) on October 29, 2011. Exhibit 13. The victim in the 2011 assault was the same Charlotte Denny who was the victim in the 2014 assault. Exhibits 12, 13, 14, and 15.
- 4.12. Mr. Smith also pleaded guilty to that charge of assault in the fourth degree on September 5, 2012. Exhibit 16.
- 4.13. Mr. Smith reported his charges or convictions to the Commission when he filed for renewal of his card room employee license in both 2014 and in 2012. Exhibit 4, page 3; Exhibit 5, page 3.

¹ The citation, issued by the Longview Police Department on May 12, 2014, shows what appears to be a "6" for the month in the box for the violation date. This is probably a poorly written "5," given the other entries for the violation date. See, Exhibit 7, page 5.

- 4.14. The Commission renewed Mr. Smith's card room employee license in 2012 and 2013.
- 4.15. Julie Sullivan is a Special Agent employed by the Commission. She has worked for the Commission since 2001. She has over 200 hours of in-house training as well as training time through the Washington State Criminal Justice Training Commission. She has a B.A. in criminal justice from Washington State University. She is certified as a fraud examiner. She works in the Licensing Operating Division investigating criminal and financial issues.
- 4.16. On November 12, 2014, Special Agent Sullivan received an assignment to review Mr. Smith's application for renewal of his card room employee license. Based on her investigation, she prepared Case Report No. 2014-02092. Exhibit 1.
- 4.17. Based on the case report, the Commission recommends that Mr. Smith's card room employee license be revoked because his two convictions for assault in the fourth degree constitute a pattern of criminal history.
- 4.18. Mr. Smith has worked in the gaming industry for fifteen years. At the Island Casino, he works as a Blackjack dealer and at other games as instructed by his employer, such as poker. Mr. Smith enjoys his work, looking forward to going to work each day.
- 4.19. Mr. Smith has one daughter, twelve years old. At the time of the hearing, Charlotte Denny no longer lives with him.
- 4.20. Mr. Smith attended four sessions of anger management with Wayne Anglin, a counselor. Mr. Smith successfully completed treatment. Exhibit A.

5. CONCLUSIONS OF LAW

Based upon the facts above, I make the following conclusions:

Jurisdiction

- 5.1. The Office of Administrative Hearings has jurisdiction to hear and initially decide this matter in an adjudicative proceeding. RCW 9.46.140; 34.05.413, 34.12.030(1), and WAC 230-17-025. The Commission received Mr. Smith's request for an administrative hearing nineteen days after the Commission served Mr. Smith with the Notice of Administrative Charges. Mr. Smith timely filed his request for an administrative hearing.
- 5.2. The Commission bases its proposed revocation of Mr. Smith's gambling license on the provisions of RCW 9.46.075(1), (4), and (8); RCW 9.46.153(1); WAC 230-03-085(1), (2) and (3). Conclusions of Law No. 5.3 through 5.6 contain the applicable language of these

statutes and administrative rules. Commission's Memorandum of Legal Authorities, page 5.

- 5.3. RCW 9.46.075 is the Commission's legislative grant of authority to deny, suspend, or revoke gambling licenses or permits. "The commission may deny an application, or suspend or revoke any license or permit issued by it, for any reason or reasons, it deems to be in the public interest. These reasons shall include, but not be limited to, cases wherein the applicant or licensee, or any person with any interest therein:

(1) has violated, failed or refused to comply with the provisions, requirements, conditions, limitations or duties imposed by chapter 9.46 RCW and any amendments thereto, or any rules adopted by the commission pursuant thereto, or when a violation of any provision of chapter 9.46 RCW, or any commission rule, has occurred upon any premises occupied or operated by any such person or over which he or she has substantial control;

....

(4) Has been convicted of, or forfeited bond upon a charge of, or pleaded guilty to, forgery, larceny, extortion, conspiracy to defraud, wilful failure to make required payments or reports to a governmental agency at any level, or filing false reports therewith, or of any similar offense or offenses, or of bribing or otherwise unlawfully influencing a public official or employee of any state or the United States, or of any crime, whether a felony or misdemeanor involving any gambling activity or physical harm to individuals or involving moral turpitude;

....

(8) fails to prove, by clear and convincing evidence, that he, she or it is qualified in accordance with the provisions of [chapter 9.46 RCW][.]

- 5.4. RCW 9.46.153(1) is a statute containing a separate statement of RCW 9.46.075(8):

It shall be the affirmative responsibility of each applicant and licensee to establish by clear and convincing evidence the necessary qualifications for licensure of each person required to be qualified under this chapter, as well as the qualifications of the facility in which the licensed activity will be conducted[.]

- 5.5. "Clear and convincing evidence" is a higher burden of proof than "preponderance of the evidence." See, *Hardee v. Department of Social and Health Services*, 172 Wn.2d 1, 6-18, 256 P.3d 339 (2011).

5.6. The Commission also relies on its administrative rules. WAC 230-03-085 states in plain language when the Commission will deny, suspend, or revoke an application, license or permit. "We [referring to the Commission] may deny, suspend, or revoke any application, license or permit, when the applicant, licensee, or anyone holding a substantial interest in the applicant's or licensee's business or organization:

- (1) commits any act that constitutes grounds for denying, suspending, or revoking licenses or permits under RCW 9.46.075; or
- (2) Has been convicted of, or forfeited bond on a charge of, or pleaded guilty to a misdemeanor or felony crime involving physical harm to individuals. "Physical harm to individuals" includes any form of criminal assault, any crime involving a threat of physical harm against another person, or any crime involving an intention to inflict physical harm on another person; or
- (3) Has demonstrated willful disregard for complying with ordinances, statutes, administrative rules, or court orders, whether at the local, state, or federal level[.]

5.7. LMC 9.12.010(1) is an ordinance adopted by the City of Longview. That section of the code provides:

- (1) A person is guilty of assault in the fourth degree when the person:
 - (a) With unlawful force and with intent touches, strikes, cuts or shoots the person or body of another, in a manner that is harmful or offensive regardless of whether any actual physical harm is done to the other person; or
 - (b) Acts with unlawful force and with intent to inflict bodily injury upon another, tending but failing to accomplish it and such act is accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary for a conviction under this subsection that bodily injury be inflicted; or
 - (c) Acts with unlawful force and with intent to create in another a reasonable apprehension and fear of bodily injury even though he or she did not intend to inflict bodily injury.
- (2) Assault in the fourth degree is a gross misdemeanor. (Ord. 2765 § 1, 2000).

5.8. The ALJ considered the evidence submitted by the Commission and Exhibit A by Mr. Smith. The ALJ did read, but did not consider, Mr. Smith's Exhibits B and C. Those two exhibits are handwritten letters from Charlotte Denny, the woman who was the victim of Mr. Smith's assaults in both 2012 and 2014. Ms. Denny was not present to testify under oath and to be subject to cross-examination. The ALJ notes the provisions of the following two provisions of the Administrative Procedure Act as they relate to evidence, as cited in Conclusions of Law No. 5.9 through 5.11.

5.9. RCW 34.05.452(1) provides:

Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

5.10. RCW 34.05.452(3) provides, "All testimony of parties and witnesses shall be made under oath or affirmation."

5.11. RCW 34.05.452(3) identifies the required method of taking a witness's testimony: under oath or affirmation.² Without being present to take the oath or give an affirmation, Ms. Denny's statements are hearsay. Any written or oral statement made by a person not present at the hearing constitutes hearsay. Although hearsay is admissible in an administrative hearing, it does not afford the parties their statutory right to conduct cross-examination. In this particular case, that means the Commission did not have the opportunity to cross-examine Ms. Denny. Mr. Smith intended that the ALJ rely on Ms. Denny's statements to the extent those statements contain factual assertions, and for the ALJ to rely on her arguments not to revoke his license to the extent those statements are arguments. Do Ms. Denny's statements come within the hearsay exception in RCW 34.05.452(1)? That is, were her factual assertions the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs? The ALJ notes that Ms. Denny was the victim of both Mr. Smith's 2012 and 2014 assaults. Her statements to the police led the police to decide to charge Mr. Smith with fourth degree assault and for the prosecutor to pursue those charges. Here, she urges that Mr. Smith's card room employee license not be revoked. Given her centrality to both of the criminal convictions, Ms. Denny should have been available to testify under oath and to be subject

² "The use of the word 'shall' imposes a mandatory duty." *Waste Management of Seattle, Inc. v. Utilities and Transportation Commission*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994).

to cross-examination. The ALJ concludes that Ms. Denny's statements are not the kind of evidence upon which a reasonably prudent person would rely on the issue of the license revocation.³ Therefore, the ALJ does not rely on Ms. Denny's statements in this Initial Order.

5.12. Mr. Smith does not dispute the facts presented by the Commission. He acknowledges that he was convicted twice for violating LMC 9.12.010(1).⁴ However, where the Commission seeks the revocation of his card room employee license, Mr. Smith asks that his card room employee license not be revoked. He suggested a probationary period. Probation usually means a period of time during which an individual is at liberty, but is also closely monitored by some authority to verify compliance with the conditions that allow him liberty. However, there is no authority to allow an individual to continue to possess a gambling license with probation.

5.13. Mr. Smith accurately noted that the two convictions arose during times when he was not at work at any casino; i.e., his "off" hours. However, the statutes under which the Commission proposes to revoke his license do not require that the convictions relate to offenses committed at a casino during a licensed employee's working hours. In particular, see RCW 9.46.075(4). To paraphrase that statute, and contrary to Mr. Smith's argument, the Commission may revoke the gambling license of any individual who has been convicted of any crime involving physical harm to another person or involving moral turpitude even if the crime does not occur in a casino during the licensee's working hours.

5.14. In both the 2012 and 2014 assaults, Mr. Smith struck Ms. Denny, causing physical harm. WAC 230-03-085(2) declares that the term "physical harm" includes "any form of criminal assault, any crime involving a threat of physical harm against another person, or any crime involving an intention to inflict physical harm on another person." From the record, it is clear that Mr. Smith intended to inflict physical harm on Ms. Denny. A man intends the natural consequences of his actions.

5.15. The crime of assault in the fourth degree is also one that involved moral turpitude. "A crime involves moral turpitude if it is an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man or to society in general." *City of Seattle v. Jones*, 3 Wn. App. 431, 437, 475 P.2d 790 (1970). Assaulting another person by hitting her, grabbing her, pushing her, pulling her hair, and grabbing between her legs, is the kind of crime that comes within the scope of the term "moral turpitude."

³ On the subject of hearsay, Mr. Anglin's handwritten statement in Exhibit A is also hearsay, but appears to be more reliable given the arms-length relationship between Mr. Anglin and Mr. Smith and given Mr. Anglin's interest in maintaining his professional reputation.

⁴ In any event, Mr. Smith cannot collaterally attack his earlier convictions in this proceeding.

5.16. The ALJ concludes that the Commission has proved by a preponderance of the evidence that the claimant violated RCW 9.46.075(1) and (4), and WAC 230-03-085(1), (2), and (3).

5.17. RCW 9.46.075(8) and 9.46.153(1) require a licensee to prove by clear and convincing evidence that it is qualified to continue to hold a gambling license. Has Mr. Smith done so? At the hearing, Mr. Smith came across as a sincere man who regrets his actions in 2012 and 2014. He has taken some steps to change his behavior, such as taking anger management training. Maybe he has stopped or reduced his drinking. He was polite during the hearing. He clearly articulated his wish to keep his card room employee license. With his two convictions on the one hand, and his demeanor in the hearing on the other hand, one simply cannot say whether Mr. Smith has changed his behavior. "Clear and convincing evidence" is a higher standard of proof than "preponderance of the evidence." See, Conclusion of Law No. 5.5, above. Ultimately, the ALJ cannot reliably conclude that Mr. Smith is done with the behavior that resulted in the 2012 and 2014 convictions. Similar behavior might or might not occur again. A conclusion that something might or might not happen (or to express it numerically, a "50/50 chance") does not rise to the level of "clear and convincing evidence." See, Conclusion of Law No. 5.5. The ALJ concludes that Mr. Smith has not proved by clear and convincing evidence that he is qualified to continue to hold a gambling license.

5.18. The Commission's administrative rule, WAC 230-17-137, provides "guidelines for imposing penalties in disciplinary actions." That rule provides:

(1) Without in any manner limiting the authority granted to the commission under chapter 9.46 RCW or other applicable law to impose the level and type of discipline it may deem appropriate, at the request of any party, the presiding officer may consider the following factors, along with such others as he or she deems relevant, in determining the administrative penalty to be assessed for the violation of a statute or rule:

- (a) The risk posed to the public health, safety, or welfare by the violation;
- (b) Whether there are special policy implications relating to the violation, for example, those regarding underage gambling;
- (c) Whether, and how, the violations impacted players, for example, failure to pay a player, and player-supported jackpot violations;
- (d) Whether the applicant, licensee, or permittee:
 - (i) Knew, or reasonably should have known, the action complained of was a violation of any law, regulation, or condition of their license;
 - (ii) Previously received a verbal warning, written warning, notice of infraction, notice of violation and settlement (NOVAS), or administrative charges from the commission for similar violations;
 - (iii) Made, or attempted to make, a financial gain from the violation;

(iv) Had an existing compliance program related to the violation; or
(v) Has subsequently initiated remedial measures to prevent similar violations from reoccurring;

(e) Whether the violations were intentional, willful, or grossly negligent;

(f) Whether requiring the applicant, licensee or permittee to implement a written self-enforcement and compliance program would assist in ensuring future compliance with relevant laws, regulations, and license conditions;

(g) If the violation was caused by an officer or employee of the applicant, licensee, or permittee:

(i) Whether the individual who caused the violation acted within the scope of authority granted to him or her by the applicant, licensee or permittee; or

(ii) Whether the individual violated company policies, procedures, or other standards;

(h) The adequacy of any relevant training programs the applicant, licensee or permittee previously offered or made available to its employees;

(i) Whether and the extent to which the applicant, licensee or permittee cooperated with the commission during the investigation of the violation;

(j) The penalties imposed on other applicants, licensees or permittees for similar violations;

(k) Whether the applicant, licensee, or permittee reasonably relied upon professional advice from an accountant or other recognized professional, which was relevant to the conduct or action resulting in the violation; or

(l) Any other aggravating or mitigating circumstances the presiding officer deems relevant.

(2) A party intending to rely on any aggravating or mitigating factors must raise them at the initial hearing before the presiding officer in order to preserve them for any subsequent hearings before a reviewing officer.

(3) In the spring of 2011, staff will report to the commission on the impacts of this rule, if any.

5.19. The ALJ considered particularly WAC 230-17-137(1)(a), (d)(i), (e), (i), and (l). The ALJ also considered Mr. Smith's evidence and his arguments. Mr. Smith committed two criminal offenses against the same person that resulted in injuries to her, for which he was charged and convicted both times. The ALJ concludes that the appropriate penalty in this case under these facts is revocation of Mr. Smith's cardroom employee gambling license.

6. INITIAL ORDER

IT IS HEREBY ORDERED THAT Robert L. Smith's card room employee license, number 68-12889, is REVOKED.

Signed at Tacoma, Washington, on the date of mailing.

John M. Gray

Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

Initial orders must be entered in accordance with RCW 34.05.461(3).
WAC 230-17-085(1). An initial order becomes the final order unless a party files a petition for review of the initial order as explained in WAC 230-17-090. WAC 230-17-085(2). Petitions for review are governed by WAC 230-17-090:

"RCW 34.05.464 governs the review of initial orders." WAC 230-17-090(1).

"Any party to an adjudicative proceeding may file a petition for review of an initial order. Parties must file the petition for review with us within twenty days of the date of service of the initial order unless otherwise stated. Parties must serve copies of the petition to all other parties or their representatives at the time the petition for review is filed." WAC 230-17-090(2).

"Petitions must specify the portions of the initial order the parties disagree with and refer to the evidence in the record on which they rely to support their petition."
WAC 230-17-090(3).

"Any party to an adjudicative proceeding may file a reply to a petition for review of an initial order. Parties must file the reply with us within thirty days of the date of service of the petition and must serve copies of the reply to all other parties or their representatives at the time the reply is filed." WAC 230-17-090(4).

"Any party may file a cross appeal. Parties must file cross appeals with us within ten days of the date the petition for review was filed with us." WAC 230-17-090(5).

"Copies of the petition or the cross appeal must be served on all other parties or their representatives at the time the petition or appeal is filed." WAC 230-17-090(6).

"After we receive the petition or appeal, the commissioners review it at a regularly scheduled commission meeting within one hundred twenty days and make a final order."
WAC 230-17-090(7).

CERTIFICATE OF MAILING IS ATTACHED

CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 03-2015-GMB-00001

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated:

Robert Smith 1041 7th Avenue Longview, WA 98632	<input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Gregory Rosen Assistant Attorney General Office Of The Attorney General Po Box 40100 Olympia, WA 98504	<input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Washington State Gambling Commission PO Box 42400 Olympia, WA 98504	<input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail

Date: Friday, June 05, 2015

OFFICE OF ADMINISTRATIVE HEARINGS

Melanie N. Barnhill
Legal Secretary